No. 11879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOE C. MARDESICH and ANTOINETTE BOGDANOVICH,

Appellants,

vs.

ANDREW XITCO, JR.,

Appellee.

OPENING BRIEF FOR APPELLANTS.

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TOPICAL INDEX

PAGE

III.

IV.

V.

TABLE OF AUTHORITIES CITED

CASES PAGE

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This appeal is from a final decree in admiralty of the District Court for the Southern District of California, Central Division, Hon Paul J. McCormick, Judge presiding, which adjudged that appellee Andrew Xitco, Jr. recover from the fishing vessel PIONEER, and appellants Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, jointly and severally, the sum of Twelve Thousand Dollars ($12,000) for salvage services rendered by the fishing vessel NORTH QUEEN to the fishing vessel PIONEER on the night of January 9, 1947. The Court rendered an oral opinion ordering a decree for appellee in the aforesaid amount [A. 49]. Formal findings and conclusions of law were prepared by counsel for appellee, signed on November 12, 1947 and entered on that date. A judgment in accordance therewith was signed, filed and entered on the same date [A. 61].

Statement as to Jurisdiction.

Admitted allegations in the pleadings show that the cause set forth in the libel is for salvage and is of admiralty cognizance, of which the District Court had jurisdiction by virtue of the constitutional grant of admiralty jurisdiction (Art. III, Sec. 2), and Sections 24 and 256 of the Judicial Code (28 U. S. C. A., Sec. 41 (3); 371).

The jurisdiction of this Court to review the said decree rests upon Section 128 of the Judicial Code (28 U. S. C. A., Sec. 225), assignments of error [A. 62] duly filed, a petition for appeal [A. 61] duly filed and allowed [A. 67] citation [A. 2], and notice of appeal [A. 68] duly served and filed.

Statement of the Case.

Prefatory Statement.

In this case the fish boat PIONEER, of a salved value of $112,567.80, stranded on a rocky bottom off Laguna Beach, California, 30 miles from San Pedro, on January 9, 1947. She attempted to back off, could not, and, while preparing to jettison fuel, wirelessed for help. The fishboats NORTH QUEEN and SUNLIGHT came promptly. The NORTH QUEEN took a cable from the PIONEER, made one unsuccessful attempt to pull off the PIONEER, which was frustrated by the breaking of the cable, and, upon a second attempt freed the PIONEER. The tide was rising throughout. About an hour and a half to two hours was required for the service. The weather was calm and peaceful. The SUNLIGHT was preparing to take a line when the PIONEER came off. The PIONEER made port under her own power. Twelve Thousand Dollars ($12,000) was awarded for the service by the

North Queen. It is contended by appellants (a) that the award is manifestly excessive, and (b) that there was serious error in the standards applied in determining the award, the most serious of which is that the availability of other assistance was not given any consideration whatsoever in determining the award.

Detailed Statement.

The Pioneer is a diesel fishing boat valued, including its net, $129,000 prior to its stranding on January 9, 1947 [A. 57]. She had a dead weight tonnage of 183 tons gross, 99 tons net; 86.4 feet in length; and was built in 1944 [A. 57].

The North Queen is a diesel fishing boat of the same general type as the Pioneer, of 150 tons gross, and length of 82 feet. Her value is alleged in the libel to have been $125,000 [A. 3]. Her value is found to have been $135,000 including net [A. 56]. There was expert testimony that her depreciated replacement value was about $100,000 [A. 198], and that there was no consistent market price for such vessels. Her owner testified to a value of $170,000 including all equipment [A. 165].

The Sunlight is a diesel fishing boat 81 feet in length, 22 feet beam, unknown tonnage and value, and 250 h. p. diesel engine [A. 23-24].

At approximately 6 p. m. on the night of January 9, 1947, the Pioneer left Newport, California [A. 168], and between 6:30 and 7:00 p. m. she stranded on submerged rocks in waters off Laguna Beach, California [A. 57]. This was shortly after low tide, which was approximately at 5:30 p. m. [A. 112]. High tide was at midnight, with a rise of about 5.6 feet anticipated [A. 112].

The PIONEER attempted to back off the rocks but did not succeed [A. 170]. The master of the PIONEER then ordered her skiff, which was being towed astern [A. 179], forward to get the anchor of the PIONEER [A. 170, 180]. At the same time she sent out a distress signal [A. 57, 170].

At the time the PIONEER stranded the sea was smooth, with a slight ground swell [A. 27, 132, 169]. The PIONEER was not pounding on the rocks but there was a slight rocking motion of about 5 to 10 degrees on the surge of the swell [A. 133, 170]. Her hull was not punctured in the course of the stranding [A. 262], and she was not leaking when she came off [A. 177].

Before the anchor was placed in the skiff, the PIONEER got the SUNLIGHT on the radio [A. 170], and the SUNLIGHT commenced to come to the assistance of the PIONEER [A. 25]. After the PIONEER got the SUNLIGHT on the radio, the master of the PIONEER told the engineer, Joe C. Mardesich, to jettison some fresh water [A. 171]. He immediately commenced jettisoning fresh water, and making preparations to jettison fuel [A. 188-192]. At the same time the master of the PIONEER told his crew to put a coil of rope in the skiff [A. 171] and they put 125 fathoms of line in the skiff, keeping 100 fathoms on the PIONEER [A. 171].

The NORTH QUEEN arrived before the SUNLIGHT on the scene of the stranding and received the rope from the PIONEER [A. 91]. At the time of the arrival of the NORTH QUEEN, the skiff had the line already in it and was rowing out towards the NORTH QUEEN [A. 91].

The NORTH QUEEN approached the PIONEER bow first, stopped before it reached the kelp surrounding the rocks

on which the PIONEER was stranded [A. 91]. How close the NORTH QUEEN approached to the PIONEER is a matter concerning which there is some superficial uncertainty. The full 225 fathoms of rope in the skiff and on the boat were paid out [A. 171, 181, 183]. The testimony from a man in the skiff was that the closest the NORTH QUEEN came to the PIONEER was about 200 fathoms. The testimony of Captain Joncich of the PIONEER was to the same effect [A. 171-172]. Matt Berry of the NORTH QUEEN testified that the NORTH QUEEN did not come closer than 300 to 400 feet of the PIONEER [A. 132]. The master of the NORTH QUEEN testified that they came to within 200 feet of the PIONEER [A. 91].

The normal position of the water line of the PIONEER is about 5 to 6 inches above sea level [A. 83]. At the time the NORTH QUEEN arrived, according to the testimony of the master of the NORTH QUEEN, the water line of the PIONEER at its stern was about even with the water, and the water line at the bow of the PIONEER was about 5 feet out of water [A. 82]. Matt Berry of the NORTH QUEEN put the bow of the PIONEER at from three to four feet out of water [A. 132]. Vincent Zuanich and Paul Tipich of the PIONEER, who were in the skiff at the bow of the PIONEER preparing to take the anchor, shortly after the PIONEER stranded, state that the water line at the bow was out about a foot [A. 180, 183]. There is no finding on the point. Curiously, the testimony of Mr. Xitco appears to be that, despite the rising tide, the level remained the same throughout the operation [A. 127].

The manila line from the PIONEER was used to pull a 5/8" steel wire from the PIONEER to the NORTH QUEEN [A. 58, 102]. In order to avoid fouling the wire with the nets and boat at the stern of the NORTH QUEEN, a

line from the boom of the PIONEER was used to lift the wire clear of the nets and turntable; with the assistance of this expedient, the wire was brought over the stern and secured to the main bitts of the PIONEER [A. 58]. After the wire was secured, and a strain was taken on it, the wire parted [A. 58]. It parted inboard of the point where the line from the boom was secured, and the man stationed at the winch released the line going up to the boom, and thence down to the line, so as to ease off the strain on the rigging [A. 103]. The line fouled in the block through which it passed and, as a result, the wire to the PIONEER was held [A. 136]. The wire was again secured and the NORTH QUEEN again pulled, and this time the PIONEER came clear [A. 58]. The NORTH QUEEN stood by while the PIONEER tried out its engines and rudder, and thereafter the PIONEER went, under its own power, to San Pedro, and the NORTH QUEEN cruised for a while, without, however, doing any fishing [A. 107]. The operation was completed at some time between 8 and 8:30 p. m. [A. 127, 178]. The total time occupied was about an hour and a half to two hours.

There was testimony, both ways, as to whether the NORTH QUEEN used a "leverage maneuver," pulling from several angles, in the effort to free the PIONEER on the second occasion [A. 29; 104-105].

Prior to the time the PIONEER came off, the SUNLIGHT had arrived and had taken a manila line, preparatory to pulling another wire on board, so that if one boat could not alone pull the PIONEER off, two would try [A. 28, 185]. Her master testified that she arrived before the line from the NORTH QUEEN snapped, and saw it break [A. 28]; There was, however, testimony that she arrived after it broke [A. 181].

The PIONEER suffered damages, the cost of repair being $16,432.20 [A. 59].

An award of Twelve Thousand Dollars ($12,000) was given.

Questions in the Case.

(1) Does the award in this case exceed by far the awards made in comparable cases, and depart from the "path of authority"; is this departure in itself so palpable as to constitute a legal error?

(2) Is the award a consequence of legal error in that the Court, in fixing it, disregarded the material factor that that other assistance than the NORTH QUEEN was available, and that the incident occurred close to port?

(3) Is the award a consequence of legal error in that the Court gave slight, if any, consideration in determining the award to the lack of danger incurred by the salvor?

(4) Is the award a consequence of legal error in that the Court did not consider that the service was rendered without expense to the salvor but, on the contrary, improperly assumed a loss of fish?

(5) Is the award a consequence of legal error in that the Court, with regard to the danger of the PIONEER, considered only its position on the rocks, and failed to consider its capacity to help itself, and the rising tide?

(6) Was the award, for all practical purposes, made solely on the basis of one factor, the skill and promptness of the assistance?

Specification of Errors.

The errors which we urge are, of course, parallel with the questions which we have stated are involved in the case. They are as follows:

I.

It is error to grant an award which is palpably excessive and which departs from the path of authority [Assignments of Error, XX and XXI, A. 66].

II.

It was error to disregard the fact that assistance other than the NORTH QUEEN was immediately available and that the stranding occurred in close proximity to a great port [Assignments of Error, XVI and XVII, A. 65].

III.

It was error to give slight or no consideration in determining the award to the lack of danger incurred by the salvor [Assignments of Error, XI and XVII, A. 64-65].

IV.

It was error to omit to consider the lack of expense to the salvor, and to consider in determining the award that there was a probable loss of fish to the salvor, in the absence of evidence supporting such a loss [Assignments of Error, XIX, A. 66].

V.

It was error, in considering the danger of the PIONEER, to consider only the fact that she was on the rocks, without considering its capacity to help itself in the rising tide [Assignments of Error, III, IV, V and VI, A. 62-63].

VI.

It was error to place virtually exclusive emphasis on skill in determining the award [Assignments of Error, IX, X, XI and XVIII, A. 64-65].

ARGUMENT.

Summary.

I.

Scope of Review.

II.

The Court Erred in Failing to Consider the Availability of Assistance Other Than the NORTH QUEEN to the PIONEER.

Assignments of Error applicable:

A. There Was Assistance Other Than the NORTH QUEEN Available to the PIONEER: the SUNLIGHT Was Standing by; San Pedro Was Close.

B. Availability of Other Assistance Is a Highly Material Factor.

C. The Availability of the Assistance Was Not Considered.

III.

The Lack of Consideration of the Lack of Danger to the NORTH QUEEN.

Applicable Assignments of Error:

A. The Situation With Respect to Consideration of Danger to the Salvor.

B. The Lack of Danger to the Salvor.

C. Lack of Consideration or Failure to Appreciate the Significance of lack of Danger to the Salvor is Cause for Reduction of the Award.

IV.

The Court Erred in Failing to Consider That the PIONEER Might Be Able to Free Herself in the Rising Tide. The Court Apparently Mistakenly Concluded That She Could Not Free Herself.

Assignments or Error applicable:

A. The PIONEER's Ability to Free Herself.

B. The Potential Ability of the Pioneer to Free Itself Was Material.

C. The Ability of the PIONEER to Free Herself Was Not Recognized as a Factor in Determining the Award.

V.

The Court Erred in Failing to Consider the Lack of Expense to the Salvor.

Assignments of Error applicable:

A. The Labor and Expense of the Salvor Is a Material Factor.

B. Lack of Expense to the Salvor Was Not Considered; on the Contrary, It Was Assumed That the Salvor Suffered a Loss of Fish.

VI.

The Court Placed Overweening Emphasis on the Skill of Appellee.

Assignments of Error applicable:

A. Skill Appears to Have Been the Principal Factor Upon Which the Award Was Based.

VII.

The District Court Erred in That It Granted an Award Which Departs From the Path of Authority and Is Palpably Excessive.

A. An Award Which Is Palpably Excessive, and Which Departs From the Path of Authority, Will Be Reduced.

B. This Award Exceeds Those Which Have Been Customary for Like Services.

Conclusion.

I.
Scope of Review.

We are urging two types of error on this appeal:

First, we are contending that the trial court erred in the standards applied to determine the amount of the award, and

Second, that the award is manifestly excessive in view of the service rendered.

These contentions, of course, raise different problems. If this Court agrees with us that the trial court omitted, in determining the award, to consider material factors in our favor, including the fact that assistance other than the NORTH QUEEN was available, and considered to our detriment various legally immaterial factors, any initial presumption as to the correctness of the trial court's judgment will then be gone, and the question will be simply one as to how much the judgment should be modified.

> *The Loch Garve* (C. C. A. 9th), 182 Fed. 519;
>
> *Rodriguez v. Bagalini (The Mary Pigeon)* (C. C. A. 9th), 1927 A. M. C. 634, 17 F. (2d) 921;
>
> *The West Harshaw* (C. C. A. 2d), 1934 A. M. C. 360, 69 F. (2d) 521.

Thus in the *Mary Pigeon* case, this Court stated (at p. 922):

> "It is the settled rule that an appellate court is reluctant to disturb an award for salvage and does so only in cases where it is based on erroneous principle or misapprehension of the facts or is grossly excessive or inadequate. *Connemara,* 108 U. S. 352. Following that rule we should be disposed to affirm

> the award of the court below were it not for the fact *that certain features of the case which we think should have received primary consideration seem to have been disregarded.*" (Italics ours.)

In that case bad faith on the salvor's part had been disregarded, and the award was therefore cut from $1,700 to $500. In the present case, the availability of assistance from San Pedro, and assistance from the SUNLIGHT, which was standing by, were totally disregarded, and the case treated as if the salvation of the PIONEER wholly depended on the skill of the NORTH QUEEN. This likewise is one of the factors which under the cases "should have received primary consideration." We believe there were other serious errors of equal dimensions.

With respect to our second contention, that the award is manifestly excessive, it will no doubt be emphasized by our opponents that an appellate court is "reluctant" to disturb the award of the District Court unless it is "clearly . . . inappropriate." (*Simpson v. Dollar* (C. C. A. 9th), 109 Fed. 814.)

The fact that the award must be clearly inappropriate, however, obviously does not preclude relief where it *is* clearly inappropriate. Nor is that general statement of a great deal of assistance in determining *when* an award is clearly inappropriate. *Simpson v. Dollar, supra,* relies in generally stating this rule on *The Bay of Naples* (C. C. A. 2d), 48 Fed. 737, in which, in this behalf, it is said (at pp. 738-739):

> ". . . Although the amount to be awarded as salvage rests, as it is said, in the discretion of the court awarding it, appellate courts will look to see if that discretion has been exercised by the court of first instance in the spirit of those decisions which

> higher tribunals have recognized and enforced, and will readjust the amount if the decree below does not follow in the path of authority, even though no principle has been violated or mistake made."

We have little doubt that we shall be able to satisfy the Court that in this case the decree "does not follow in the path of authority . . ." That a salvage award will be modified which departs from "the path of authority" likewise is expressly stated in the more recent case of

> *Canadian Government Merchant Marine Ltd. v. United States* (C. C. A. 2d), 1925 A. M. C. 765, 769; 7 F. (2d) 69.

And, in

> *The Wahkeena* (C. C. A. 9th), 1932 A. M. C. 556, 56 F. (2d) 836,

this Court apparently followed the same principle, since it reduced a judgment giving a moiety of the value of the salvaged vessel in circumstances not heretofore held to justify such an award.

We shall explore the cases dealing with these rules more fully in connection with the particular errors we urge. We desire for the present merely to point out that to the extent that there are actual errors in the standards applied, the traditional reluctance of an appellate court to reconsider a salvage award disappears, and that, further, despite such reluctance, if the award goes substantially beyond those traditionally allowed for like services, an appellate court will in any event intervene to correct it.

II.

The Court Erred in Failing to Consider the Availability of Assistance, Other Than the North Queen, to the Pioneer.

Assignments of Error applicable:

XVI. That the Court erred in that it did not find or consider in determining the award that the PIONEER was close to port where further assistance could have been obtained.

XVII. That the court erred in that it did not find or consider in determining the amount of the award that the NORTH QUEEN was exposed to little or no danger in assisting the PIONEER.

A. There Was Assistance Other Than the North Queen Available to the Pioneer; The Sunlight Was Standing by; San Pedro Was Close.

This is a case in which twelve thousand dollars, over ten per cent of the salvaged value of the assisted craft, was granted for an hour and a half's assistance, in calm weather, on a rising tide, to a craft not proved to be herself helpless, which afterwards made port under her own power. There were no circumstances of special danger, hardship or heroism to the assisting craft. We believe so high an award would not have been granted, in the absence of fundamental errors in the standard applied. One such error was that the PIONEER was treated as if helpless in remote seas, where, if the succor offered by the appellee were not effective, certain destruction would have been the fate of the PIONEER.

But libelant's boat, the NORTH QUEEN, was neither the first nor the only boat to offer assistance to the PIONEER. When the PIONEER sent out its distress signal, the testi-

mony of Captain Marion Joncich shows that the PIONEER got, not the NORTH QUEEN, but the SUNLIGHT on its radio [A. 170, 171]. The testimony of John Joncich, master of the SUNLIGHT (not related to Marion Joncich, the master of the PIONEER [A. 224]), also is that he received the distress signal of the PIONEER and directed the PIONEER to spin its searchlight in the air and went to its assistance [A. 24, 25]. Due, however, to the fact that the NORTH QUEEN was apparently closer to the PIONEER, the NORTH QUEEN arrived first. The NORTH QUEEN seemingly did not make any answer by radio to the distress signal of the PIONEER, but went directly to its location.

By the time the SUNLIGHT arrived, the NORTH QUEEN had taken a line and was pulling against the PIONEER [John Joncich, A. 26]. The SUNLIGHT then offered to take a line from the PIONEER [John Joncich, A. 28] and shortly before the time the PIONEER came off, had taken a Manila line from the PIONEER, to be used in pulling a towing wire to it [Vincent Zuanich, A. 182; Paul Tipich, A. 184].

The SUNLIGHT was a Diesel fishing boat with a 250 h.p. engine [John Joncich, A. 24], which is slightly less than the 300 h.p. of the NORTH QUEEN's engine [Berry, A. 148]. The SUNLIGHT was ready, willing and able to assist. In this behalf, John Joncich testified [A. 34]:

> "Q. Did you have any line aboard that would have been suitable for assisting the PIONEER? A. I did. I had a 5/8ths inch cable.
>
> Q. How long? A. Oh, I had about 450 feet.
>
> Q. Did your boat have a towing bitt? A. It has a regular towing bitt.
>
> Q. Located where? A. Amidships, behind the pilot house.

Q. In your opinion, from your familiarity with the SUNLIGHT, was she capable of rendering assistance to the PIONEER in pulling her off the strand? A. We were." [47]

"Q. In standing by were you doing so in order to render assistance, if any assistance was requested by the PIONEER? A. We were standing by, yes.

Q. You were standing by for that purpose? A. Yes. If one boat couldn't pull him off, the two of us might."

It may also be noted that Laguna Beach is about thirty miles from San Pedro [John Joncich, A. 24]. The Court may take judicial notice of the fact that San Pedro is a major port, at which large tugs and salvage equipment is available.

B. Availability of Other Assistance Is a Highly Material Factor.

That availability of other assistance is a material factor, and one which the Court is required to consider, there can be no doubt. In this Circuit, there are at least two cases in which that factor has been dealt with. The earliest is *The Monticello* (D. C., N. D. Cal.), 81 Fed. 211, in which the Court stated (at p. 214):

". . . That other assistance was then near at hand is, as stated, clearly established by the testimony. The effect of this proof is, of course, to reduce the merit of the services rendered by the San Benito. It is always considered by courts of admiralty an important element in fixing the compensation to be awarded. The Suliote, 5 Fed. 99; The O. C. Hanchett, 22 C. C. A. 678, 76 Fed. 1003; The H. B. Foster, Fed. Cas. No. 6,290; The Saragossa, *Id.* 12,334. The port of San Francisco was about 100 miles away.

> Powerful, swift, and thoroughly equipped tugboats were there, ready at a moment's notice to respond to the call for a tow,—particularly to a vessel in a disabled condition."

In that case $350 was allowed as salvage, for seven to eight hours' towing of a disabled vessel valued at $12,000. The assisting craft was valued at about $425,000 and ordinarily earned between $600 and $700 a day.

In the present case, instead of being 100 miles from San Francisco, the PIONEER was 30 miles from Los Angeles—likewise a major port where salvage equipment is at all times available.

In the case of *The Wahkeena* (C. C. A. 9th), 56 F. (2d) 836, 1932 A. M. C. 556, this Court made the following statement (at p. 558):

> "Aside from the conflicts in the testimony already noticed, there are two other material questions concerning which the parties are in sharp disagreement:
>
> "1. What would have been the WAHKEENA'S chances of saving herself had she not been rescued by the CUDAHY?
>
> "2. Were other tugs available to the WAHKEENA at the time the CUDAHY came alongside?
>
> "*Since both of these matters go to the value of the appellee's services,* we will give them some brief consideration. (Italics ours.)
>
> "1. The appellant contends that there were at least 18 other tugs available to assist the schooner, and there is some testimony to support this assertion. On the other hand, there is ample evidence that the JOHN CUDAHY was 'considered the strongest bar tug there' and that few, if any, of the craft suggested

> by the appellant would have been able to find the WAHKEENA in the thick fog, or would have been able to tow her back if they had found her."

In this case the WAHKEENA was stranded on the jetty at Grays Harbor and was pounding in a strong tide. The tugboat JOHN CUDAHY pulled her off, pumped her out, and towed her back to the Aberdeen docks. Both the WAHKEENA's boilers were out and she was without steam, was helpless on the jetty, and she was leaking. The CUDAHY together with the TYEE, another tug owned by the libelant in the case, and a third tugboat towed the WAHKEENA back to the Aberdeen docks. The assistance occupied a period of upwards of 19 hours. An award of $8,162.50 was made by the trial court, which was reduced on appeal to $5,000.

The case is not comparable on its facts to our own, due to the much more extensive services rendered, the greater danger in the position of the WAHKEENA, and the unavailability of other assistance. It does, however, establish plainly that availability of assistance is a factor which must be considered.

In *Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co.* (C. C. A. 4th), 280 Fed. 334, cert. den. 259 U. S. 584, 42 S. Ct. 586, the same principle was recognized in the Fourth Circuit. In that case the Italian steamship TEA, valued at $370,000, grounded in the Mediterranean. She was pulled off, after 39 hours' labor, by the American steamship ST. CHARLES. The trial court granted an award of $34,000, stating, in partial support of

the award, that no other assistance was available (271 Fed. at 103). The Fourth Circuit reduced the award to $20,000, stating (at p. 337):

> "Moreover, it can hardly be said that the St. Charles was the only source of relief, since other vessels were passing at no great distance, from one or more of which the needful aid might have been procured."

In the present case, there were not only other vessels *passing* by, there was another vessel *standing* by.

De Aldamiz v. Th. Skogland & Sons (C. C. A. 5th), 17 F. (2d) 873, is comparable to the present case, both as respects the values of the ships and the degree of danger involved. In that case the PER SKOGLAND, valued at $60,000, stranded on the bar of the port of Frontera, Mexico. She was pulled off in about 1 hour and 30 minutes by the RAJAH, valued at $150,000. There was no immediate danger in the position of the PER SKOGLAND, but severe storms were of common occurrence in the particular season. The Fifth Circuit Court of Appeals increased the award from $750 to $5,000, stating (at p. 874):

> ". . . That danger was enhanced by the lack of tugs equipped to render salvage service, though there was also the chance that a steamer able and willing to do so might come to the rescue. The evidence is far from being convincing that any of the other three ships in the vicinity of Frontera was capable of saving the ship in distress, or was willing to take the risk of doing so."

In the present case the value of the vessel salvaged is about $112,000 in contrast to $60,000 for the vessel salved in the *De Aldamiz* case. The value of the salving

craft was, however, substantially greater than that of the NORTH QUEEN. The operation in the *De Aldemiz* case required very careful maneuvering, apparently in difficult waters, to avoid stranding the salving vessel, while the present case did not involve any particular difficulty. In that case there was no one in the harbor ready to assist, whereas in the present case there was another boat of nearly equal power standing by. In that case the nearest tugs were at Tampico, more than three hundred miles away—in the present case they were certainly available in San Pedro—thirty miles, less than three hours away, for a fast tug. In the present case it had not yet been established whether the PIONEER could free herself, on the rise of tide, by jettisoning stores and fuels, by her own efforts. In the *De Aldamiz* case it was clear that the PER SKOGLAND was helpless. If in that case the *unavailability* of other assistance called for an increase in the award from $750.00 to $5,000.00, the *availability* of such assistance in our case would require a reduction to something substantially below that $5,000.00 figure.

In *The John J. Howlett* (District Court, E. D. Pennsylvania), 256 Fed. 971, it is said (at p. 972):

> "Another feature of importance is the presence or absence of other promise of assistance than that rendered. Many of the elements which enter into an award of salvage compensation or allowance are difficult of admeasurement."

In *The Livietta* (C. C. A. 5th), 242 Fed. 195, it is said (at p. 208):

> ". . . It is to be remembered, however, that she was on an ocean path that was constantly used by

vessels from which she could have received help. The danger was not of that character which would have existed if she had been far out at sea, or in waters rarely used."

In *The Peru* (E. D. Pa.), 99 Fed. 783, it is said (at p. 785):

". . . Turning, then, to the case before the court, and bearing in mind the facts above set forth, I have no doubt that, if the Peru had not been towed away at the time when that service was performed, she would have been either destroyed or seriously damaged. But it is equally clear that the Lincoln was not indispensable. If she had not been there to render the service, the King would have performed it without delay. The Lincoln herself was at no time in danger, and the work she did was not of an extraordinary character."

Other cases holding that the availability of other assistance is material, are:

The High Cliff (C. C. A. 2d), 271 Fed. 202;

Cuyamel Fruit Co. v. Bostrom (C. C. A. 5th), 19 F. (2d) 10 (cert. den. 275 U. S. 544, 72 L. Ed. 417, 48 S. Ct. 83);

The Roman Prince (D. C., S. D. N. Y.), 88 Fed. 336;

The Marie (D. C., E. D. N. Y.), 39 Fed. 501;

The Plymouth Rock (D. C., S. D. N. Y.), 9 Fed. 413;

The Santa Barbara (C. C. A. 4th), 299 Fed. 152.

C. The Availability of Such Other Assistance Was Not Considered.

There can be no question that the availability of assistance other than the NORTH QUEEN was a material factor in determining the award to which the NORTH QUEEN was entitled. The cases cited above are conclusive on this question. There can likewise be no question that other assistance was available. Not only was the situation one where, as in *The Monticello, supra,* thoroughly equipped tugs were available within far less than 100 miles, or, as in the case of THE TEA, other vessels were in the neighborhood which could be called upon, but the situation was one where another vessel was standing by and had actually commenced preparations to take a line on board.

There can likewise be no doubt that this factor was not considered in determining the amount of the award. The opinion of the trial court, and the findings, are inconsistent with the possibility that the availability of such assistance might have been considered.

The findings, of course, are required by the rules of the Supreme Court to contain the material facts upon which the trial court based its decision. (Admiralty Rule 46½.) There is no mention of the presence, the availability, or the offer of assistance by the SUNLIGHT in the findings. So far as the findings are concerned, the case is one involving the sole activity and sole presence of the NORTH QUEEN. The assumption which must necessarily be drawn from the findings, that the case was considered as one in which the NORTH QUEEN was the only vessel available, is borne out by the oral opinion of the court [A. 49-55].

In that opinion, the Trial Judge discussed factors on which he relied in making the award. He makes no mention of the SUNLIGHT; no mention of the offer of assistance, no mention of the availability of other assistance. On the contrary, the case is treated purely as one where the NORTH QUEEN, with some assistance from the tide, saved the PIONEER from likely destruction. He states [A. 52]:

> ". . . I think the major factor was the maneuvering of the vessel, the salvor, and that had it not been for that movement the consequences that ensued to the disabled vessel might have been very serious. How serious I think is a pure matter of conjecture."

We repeat his words:

> ". . . the major factor was the maneuvering of the vessel . . . —*had it not been for that movement the consequences that ensued to the disabled vessel might have been very serious.*"

These words show that the situation in the court's mind was one where, if the NORTH QUEEN's efforts failed, the PIONEER was very probably lost. There is certainly no consciousness here that there was another vessel ready to take a line so that "if one boat couldn't pull him off, the two of us might." [Testimony of John Joncich of the SUNLIGHT [A. 34].]

We do not think that one need go far to understand how this could happen. The testimony of the master, engineer and one fisherman on the SUNLIGHT was taken by deposition. The depositions were not raised in court, but, in order to expedite the trial, placed in evidence on the

understanding that they were to be considered by the court [A. 223]. It is not surprising that the cold print of the depositions would have impressed itself less vividly on the court's mind than the testimony of the witnesses who actually testified in open court, for at the trial the SUNLIGHT received relatively brief mention. It is well established that, to the extent that a case is controlled by testimony given by depositions, it comes before the appellate court *de novo* in admiralty.

Whatever may be the explanation, it seems transparently clear that the availability of the SUNLIGHT'S assistance was given no weight in the determination of the award.

In the case of *The Tea, supra,* an award was decreased substantially by the Fifth Circuit Court of Appeals for such failure.

In *The De Aldamiz* case, an award was increased, in part, by reason of failure to consider that other assistance was not available.

In the case of *The Wahkeena, supra,* this court expressly recognized that such is a material factor in determining the award.

We submit, therefore, that since this factor was not considered in this case, such error is cause for a reduction of the amount of the award. And the reduction, we submit, should be substantial, for the quoted language from the court's opinion shows that failure to consider this factor resulted in an entire misapprehension of the significance of the assistance of the NORTH QUEEN.

III.

The Trial Court Erred in Failing to Consider the Lack of Danger to the North Queen.

Applicable Assignments of Error.

XVII. That the court erred in that it did not find or consider in determining the amount of the award that the North Queen was exposed to little or no danger in assisting the Pioneer.

XI. That the court erred in that it did not find or consider in determining the award, that the assistance rendered by the North Queen was rendered without substantial peril to, expense to, or sacrifice by the North Queen, her master or crew.

A. The Trial Court Did Not Consider Lack of Danger to The Salvor as a Factor in Decreasing the Award.

There were no findings made that the North Queen incurred any risk in salving the Pioneer. The findings rest the award exclusively on the skill of the appellee, the supposed danger of the Pioneer, and the respective values of the vessels. There is, however, a mention of this factor in the oral opinion of the Trial Court. It is stated [A. 50-51]:

> "She responded to the call, and in doing so, while probably not placing herself in a great peril on account of the distance separating the two vessels at the time of the first movement, there was a good deal of danger to be apprehended in going close to the obstacles in the pathway, which had caused the (70) 'Pioneer' to become fixed on the rocks."

In concluding, the Court further stated [A. 54-55]:

> "It was the maneuvering of the vessel in a way to give leverage so that the greatest amount of beneficial force could be used on the disabled vessel, and at the same time taking proper precautions to not submit the salver to an unusual risk. It is those two features which I think bring the case up into the dignity of a high degree of skill."

These words, it seems to us, establish that the findings correctly represent the factors considered by the Court, and that the lack of danger to the NORTH QUEEN was not weighed as itself a major factor in *decreasing* the amount of her award, but instead was considered merely as a phase of the question of skill and apparently treated as a reason for *increasing* her award! The salvor's skill is the only factor mentioned in the findings other than danger to the PIONEER, and apparently the only other factor given any real weight.

We have hesitated to go into the oral opinion of the Trial Court in this connection, because it seems to us to be plain that the factors considered in fixing the award must, as a matter of law, be discovered in the findings. But we have set them forth because we feel that in this important phase of the case, this Court would wish to know that the practically exclusive emphasis on skill in the findings was not any mere inadvertence, and that in fact skill was the sole basis for high award. If the Court finds the oral opinion ambiguous, the findings, of course, must be the ultimate test as to the factors upon which the award is based, as to the justifiability thereof.

B. The Lack of Danger to The Salvor Is Clear From the Record.

Due to the length of the line separating the PIONEER from the NORTH QUEEN, the NORTH QUEEN was not required to approach closely to the obstacles which had fixed the NORTH QUEEN. When the NORTH QUEEN first approached the PIONEER, the skiff from the PIONEER took to the NORTH QUEEN about 200 to 225 fathoms of line [A. 181, 171]. There was no substantial bight in the rope because it floated on the kelp between the boats [A. 182]. This was used to pull about 200 fathoms of steel wire to the NORTH QUEEN. A fathom is 6 feet, and there would therefore seem to have been no occasion for the NORTH QUEEN to have approached much closer than 1,200 feet from the PIONEER. This she did cautiously.

The weather was calm; there was only a gentle swell, which imparted to the PIONEER "a slight rocking motion" [Matt Berry, A. 133]. More ideal conditions for such an operation could hardly be imagined.

Since the line was brought out by the PIONEER to the NORTH QUEEN, the PIONEER itself protected its salvor from any risk which might arise from a too close approach. There are many cases in which substantially similar maneuvers have been described as essentially without serious risk.

The Tordenskjold (C. C. A. 5th), 255 Fed. 672;

Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co. (C. C. A. 4th), 280 Fed. 334;

The Hesper (D. C. E. D. Tex.), 18 Fed. 692, award reduced, 18 Fed. 696, aff'd 122 U. S. 256, 7 S. Ct. 1177;

The Lucia (D. C. S. D. Fla.), 222 Fed. 1015.

Clearly, therefore, the NORTH QUEEN incurred no substantial danger. Moreover, the NORTH QUEEN was equipped with a fathometer [A. 116], and the testimony of the master of the SUNLIGHT [A. 28] was that by the use of this device it is possible continuously to ascertain the amount of water beneath the keel of the subject vessel. The SUNLIGHT was alongside the PIONEER and had about 5 fathoms of water beneath her bottom [A. 27].

When these cases (which hold that mere pulling against a stranded vessel in calm waters is not in itself a dangerous activity), were decided, this device was not in use. A boat so equipped can hardly be in greater danger than were the vessels in these cases.

There was some effort made to show the rigging of the NORTH QUEEN was in danger as a result of its possible collapse from the strain imposed when the line from the PIONEER broke. However, the mast itself was supported by a 1-inch to ⅞-inch steel wire [A. 123], and the boom was held to the mast by four 3½-inch Manila lines [A. 123]. It is uncontradicted that both the wire supporting the mast and the lines supporting the boom were of greater strength than the wire from the PIONEER to the NORTH QUEEN itself, which was only a ⅝-inch steel wire and which was old and somewhat rusted [A. 211]. There was likewise uncontradicted testimony that should any portion of the rigging of the NORTH QUEEN give, the first to go would be the topping lift (the manila lines) holding the boom aloft [A. 212]. The value of the boom was only about $300.00, including labor for repairs [Scheibe, A. 212], and there was no evidence that anyone was in a position to be injured if it fell. And indeed the sug-

gestion that there was such danger to the rigging is after all sheer speculation, for the line to the PIONEER did break and there was in fact no damage to the rigging.

It was expressly testified by libelant that there was no danger of fouling the NORTH QUEEN in the course of the salving operation [A. 128].

To sum up, there was no unusual danger to the NORTH QUEEN.

C. Lack of Consideration or Failure to Appreciate the Significance of Lack of Danger to Salvor Is Cause for Reduction of the Award.

That danger to the salvor is a material factor, indeed probably the most important single factor in determining the award, is established by so many cases that we hesitate to cite any. Some of these cases are, however, so comparable in their facts as to be most enlightening, and we shall concentrate on these in order to avoid merely belaboring the obvious.

In the case of *The Miskianza* (C. C. A. 2d), 1928 A. M. C. 1332, 27 F. (2d) 734, the tug ST. HELIERS, valued at $100,000, freed the tanker MISKIANZA, valued at over $600,000 with cargo, from a strand. The tug was obliged "to poke about at night in very contracted waters in a strong current." She was in danger both from submerged rocks and a rock jetty. She was pulling and maneuvering in these waters for about eight hours, and suffered damage in the process. The trial court awarded $6,500, which on appeal was increased to $12,500, plus cost of repairs, the Court stating:

> "Nevertheless, for reasons already stated, we think there was more danger to the salvor than the trial judge conceded, and therefore, in view of the suc-

> cess of the undertaking and the value salved, the award should be increased to the sum of $12,500, in addition to the cost of repairs."

It is worth noting that in that case the values were almost six times those involved in the present case, the labor four times as great, the danger to the salvor incomparably greater. Yet appellee claims the same reward.

In the case of *The Tordenskjold* (C. C. A. 5th), 255 Fed. 672, the vessel of that name, a Norwegian steamer valued with cargo at about a million dollars, stranded on the Florida coast. The tug TAGGART BROTHERS, valued at about $85,000, reached the vessel between 7 and 8 o'clock in the evening on October 27, five days after she stranded, and pulled for something like 3 hours without success. On the following morning she left to take care of certain barges for which she was responsible, with the consent of the master of the TORDENSKJOLD, and returned on the 29th. At this time she pulled the TORDENSKJOLD off.

The District Court describes the TORDENSKJOLD as having been aground on a reef. It found that it was not possible for the TORDENSKJOLD to free herself by jettisoning cargo, due to lack of steering room if she did float. It stated that (p. 673):

> "There can be no question that any ship ashore on the Florida Reefs, exposed as this one was to the full force of the sea during the months of September and October, is in great peril."

The District Court awarded $40,000. On appeal the award was reduced to $10,000. The court stated (at pp. 674-675):

> ". . . The value of the property saved made it proper to award more than should have been awarded

if that value had been greatly less. But the award should be materially less than it properly might have been *if the service rendered had involved great peril or serious loss or damage to the tug or its equipment or tows, or grave danger, heroic effort, or unusual hardships to its officers or crew. The amount of the award made indicates that undue weight was attached to the value of the property saved, and that there was a lack of due consideration of the absence of such attending circumstances as would justify the liberality evidenced by the decree.* In view of the value of what was saved and of that employed in the rescue, of the time, labor, and expense involved in the service, and of all the attending circumstances, our conclusion is that the amount that should be awarded is $10,000, instead of $40,000, the amount awarded by the decree appealed from. That decree will be here modified, as just indicated, and, as so modified, it is affirmed, with costs against the appellees."

There we have a vessel stranded as was this one. Its peril was the same as the peril presented here, that, if present fine weather ceased, the action of the seas would destroy the stranded ship. Unlike the present case, there was no possibility of the salved vessel freeing herself. The period of service exceeds anything involved in this case, and, so far as appears, there was no other assistance available. If the lack of danger in that service brought the award down to $10,000, where the value is so much greater (nearly ten times that in our case), the need so much clearer, the labor so much more substantial, where also there was no other assistance available, how can it be contended that a $12,000 award may be sustained here?

The old case of *The Hesper* (D. C., E. D. Tex.), 18 Fed. 692, modified by the Circuit Court, E. D. Texas, 18

Fed. 696, is virtually an exact analogue in so far as the value salved is concerned, though the service rendered substantially exceeded in work and labor that in this case. In this case the HESPER, of the value of $100,000, with a cargo valued at $6,500.00, grounded in the Gulf. She was assisted by three tugs valued at $35,000 over a period of three days. It was found that the prevailing winds on that shore were sometimes of great violence, but that during the period involved there was no wind or sea of any special danger, and that the services were not attended with any special hazard. The District Court awarded $8,000 which, on appeal, was reduced by the Circuit Court to $4,200. The Circuit Court. on appeal, stated, at page 699:

> "Various points were urged in argument to increase the salvage,—that the wreckage service should be encouraged; that storms might have come that would have destroyed the vessel; that the salving tug injured herself in tugging at the ship salved, etc. It is true that all encouragement should be given to mariners, ships, and landsmen to save property imperiled on the high seas, but where there is no chance for the exercise of gallantry, heroism, or risk, why should an already distressed and imperiled ship be subject to pay additional expense for ordinary services, and these expenses be chargeable solely to her calamity?"

The values of the assisting tugs, it is true, were less in *The Hesper* case than the value of the salvor here. But, the value of a salvor not in danger is not to be considered, except in so far as its earnings were lost, and this, therefore, would not seem material *The Livietta* (C. C. A. 5th), 242 Fed. 195, 205.

The salvors in THE HESPER were somewhat less ready to assist than was libelant in this case, and rather more deliberate about doing so, but, on the other hand, they spent a great deal more time, and there was some evidence before the court that they would have earned about half as much as they were awarded, had there been no award. There is no like evidence in this case. It was found that the HESPER was hardly likely to be able to free herself No such finding exists in this case, and one could not be supported. It seems to us that, taken as a whole, the circumstances of dissimilarity between the cases more than cancel out, that certainly no greater award would be justified in this case than in *The Hesper*. In fact it seems clear that the award should not go as high.

The Hesper, as modified by the Circuit Court, was affirmed in 122 U. S. 256, 257, 7 S. Ct. 1177.

In *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.,* 94 Fed. 214 (C. C. A. 5th), the TORR HEAD, of a value of $300,000, was freed from a strand on Frying Pan Shoals of the North Carolina Coast by three tugs of relatively small value. Each spent between nine and twelve hours, over a two day period. The District Court awarded $13,000, which on appeal was reduced to $6,500, lack of any extraordinary danger or hardship to the salvor being emphasized, together with some misapprehension by the trial court as to the danger of the stranded vessel.

In *The Santa Rosa* (C. C. A. 4th), 5 F. (2d) 478, it is said at p. 481:

> "In determining the award in a salvage case the main consideration is danger to the lives of the salvors, and next to their boats and property. In this case there appears to have been no imminent dan-

ger to the lives and boats of the salvors, other than that incident to their vocations, the danger incident to the danger of gaining a livelihood on the seas."

In *The Lucia* (D. C., S. D. Fla.), 222 Fed. 1015, the vessel of that name was stranded on a sand bar off the Florida coast. She was valued at $300,000. She was in a serious danger should a heavy wind from the northwest or southerly direction arise. The CONEY, valued at $30,000, assisted the LUCIA to jettison cargo, and thereafter, the ship also using its own means, pulled the vessel off. About two days' services were involved. The Court stated at p. 1017:

> "I find that the service rendered by the tug was salvage, but of the lowest grade. There was no risk of property, peril to life or limb, unusual expense, gallantry, courage or heroism. The Hesper Case, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175.
>
> "The Supreme Court in The Blackwall, 10 Wall. 1, 19 L. Ed. 870, lays down the rule for fixing compensation in salvage cases:
>
> (a) Labor expended by the salvors in rendering the salvage service.
>
> (b) The promptitude, skill, and energy displayed in rendering the service.
>
> (c) The value of the property employed by the salvors, and the danger to which it is exposed in the service.
>
> (d) The risk incurred by the salvors in saving the imperiled property.
>
> (e) The value of the property saved.
>
> (f) The degree of danger from which the property is saved.

"As before stated, I cannot find from this testimony any great degree of danger to the property used by the salvors nor to the persons employed in the service. The property saved, the LUCIA, was in a certain amount of danger, for, as has been well said, ships are intended to float, and when one goes aground there is always danger attendant. She is out of her element. The LUCIA was in danger, therefore, and I think the service rendered by the CONEY was more than mere towage service. But I fail to find in this case the elements that would authorize a large award for the service rendered."

The Court awarded $4,000 for the service. It may be noted that this is closely comparable to the allowance made in *The Hesper* Case. The cases heretofore cited in which larger awards were made all involved far greater valuations and services.

We could continue to set out cases asserting the same proposition in great length. There is no necessity of our doing so, because it cannot be denied that the danger to the salvor (or, as in our case, the entire lack of it) is a highly significant factor. The manner in which this factor is referred to in the Court's oral opinion shows that it was treated merely as a phase, probably a minor phase, of the skill of the salvor, and any doubt that may exist in this respect from the opinion is wholly eliminated by the findings, which do not even mention the question. This is a factor which should have received primary consideration, and a substantial modification of the award would therefore seem to be required.

Rodrigues v. Bagalini (The Mary Pigeon) (C. C. A. 9th), 1927 A. M. C. 634, 17 F. (2d) 921.

IV.

The Court Erred in Failing to Consider That the Pioneer Might Be Able to Free Herself in the Rising Tide. The Court Apparently Mistakenly Concluded That She Could Not Free Herself.

ASSIGNMENTS OF ERROR APPLICABLE.

"III. That the court erred in not finding and not considering in determining the award that the PIONEER stranded very shortly (85) after low tide; that when the PIONEER was stranded the waterline at her bow was approximately one foot out of water and the waterline at her stern about even with the water; that the weather was calm and that there was approximately a 5-foot rise of tide to be anticipated; that the PIONEER was not pounding or leaking and her means of propulsion were entirely sound and that it was likely that without assistance she would have succeeded in freeing herself before high tide on the night of her stranding.

IV. That the court erred in that it did not find and did not consider in determining the award that it was likely that the PIONEER would free herself without assistance, except the assistance of the rising tide.

V. That the court erred in finding and in considering, in determining the award, that the PIONEER was stranded on the rocks in such a manner as to be in great peril from the sea and elements.

VI. That the court erred in that it did not find, and did not consider in determining the award that the PIONEER was not in immediate danger, but would have been in more serious danger if the weather took a change for the worse."

A. It Is Highly Probable That the Pioneer Could Have Freed Herself With the Rising Tide.

The evidence shows without dispute that after the PIONEER stranded, she attempted to back off, unsuccessfully. She then stopped her engines, which, however, were still in working order. In fact, when she pulled free, she went back to San Pedro under her own power, without escort [A. 177]. She was not leaking [A. 177].

It shows further that the PIONEER struck at approximately 6:30 p. m., about an hour after low tide, and that high tide would have been about midnight, or six and one-half hours after low tide, and five and one-half hours after the PIONEER struck. It is an elementary physical fact, of which the Court may take judicial notice, that there is relatively little flow of tide at the extreme ebb and at the extreme high tide. There was a 5-foot rise in tide to be expected, and very little of it could have occurred when the PIONEER struck.

Two members of the crew of the PIONEER went forward in a boat to take the anchors of the PIONEER from the bow of the PIONEER. The anchors were to be used in an attempt to pull the PIONEER off. Their testimony was that the waterline at the bow of the PIONEER which, according to undisputed testimony, is ordinarily about six inches out of water [Xitco, A. 83], was then about a foot out of water.

Vincent Zuanich testified [A. 180]:

> "Q. When you were at the bow, did you see how far above the water level the water line of the PIONEER was? A. Maybe one foot."

Paul Tipich testified [A. 183]:

> "Q. Did you go forward with Mr. Zuanich in the skiff? A. Yes, I did.
>
> Q. Did you see where the water line of the PIONEER was with relation to the surface of the water? A. Yes, it was about a foot above water."

In this testimony, it seems to us that there could be no question that the PIONEER would have floated free before high tide.

This testimony was, however, contradicted. Mr. Xitco testified that the waterline at the bow of the PIONEER was four to five feet out of water at the time of the arrival of the NORTH QUEEN [A. 82]. Mr. Berry, who was on the NORTH QUEEN, testified that the bow of the PIONEER was three to four feet out of water when the NORTH QUEEN arrived [A. 132]. This testimony was unique. It seems to us that there are three very good reasons why this testimony cannot be accepted on this point. The first is that these witnesses were hundreds of feet away observing at night by the light of a searchlight. It is impossible to conceive how they could have made an observation of this sort with any degree of accuracy at all.

In the second place, Mr. Xitco's testimony is that the level of the water at the waterline on the bow of the PIONEER was just about the same when the NORTH QUEEN first came in as when she pulled against the PIONEER immediately before the PIONEER came off [Xitco, A. 127]—this, despite a rising tide. Such testimony can hardly be entitled to any credit.

In the third place, both the experts in the case—Captain Varnum, who was representing appellee, and Captain Scheibe, who testified on behalf of appellants—testified

that if the PIONEER was hard aground with her bow waterline three to five feet out of water, she could not have been pulled off by a vessel the size of the NORTH QUEEN pulling against a 5/8" wire.

Captain Varnum was asked on cross-examination [A. 162]:

> "Q. In your opinion, assuming a vessel of around 170 tons on the rocks along the full length of her keel, with her bow 3 to 5 feet out of water, when the vessel was only pulling against a 5/8-inch steel wire, do you think such a vessel pulling on such equipment can pull such a ship off the strand?"

After objection, he answered [A. 163]:

> "A. I don't know, because if she was hard aground like that, he couldn't pull her out with a 5/8-inch wire."

Since the PIONEER did in fact come off merely by pulling on a 5/8-inch steel wire, the conclusion seems inescapable that the PIONEER was not high and dry as Mr. Xitco and Mr. Berry testified, but was pretty much in the position that the men best able to observe state, that is, that when she struck the waterline was about a foot or so out of water.

Captain Scheibe testified in this behalf as follows [A. 207]:

> "Q. In your opinion, Captain Scheibe, if the PIONEER went hard aground at between 6:30 and 7:30, and her bow was from three to five feet—her water line was from three to five feet out of water, could a fishing vessel with a motor of 300 horsepower pulling on a 5/8-inch cable free the PIONEER?
>
> Mr. Lande: I object to that, Your Honor, as not containing the element as to the manner in which

the pulling of the NORTH QUEEN was done. On a straight pull the evidence is that the line parted but on a swerving back and forth the evidence is that she worked her off.

Q. By Mr. Verleger: In the last question you may assume: If the PIONEER was hard aground and had not in whole or in part been freed by the tide, and was in a position with her bow from three to five feet out of water, could a vessel the size and capabilities of the NORTH QUEEN, with an engine of 300 horse-power pulling on a 5/8-inch steel wire (162) by swerving back and forth pull the PIONEER off? A. No.

Q. Why do you say that? A. You assume that the bow is four to five feet out of water and it is never hard and fast aground. By pulling with a fishing boat and with a 300 horse-power engine, he hasn't sufficient horse-power to move that vessel when it is hard and fast.

Q. In your opinion, is it essential before such a pulling operation can be successful to have the boat partly freed by the rise in tide? A. It is.

Q. You may assume that the PIONEER went aground at approximately between 6:30 and 7:30 and the tide conditions were as previously stated; that her bow was approximately one foot to a foot and a half out of water when she stranded, and that she came off between 7:30 and 9:00 o'clock. What, in your opinion, was the principal factor in freeing her? A. Tide."

The conclusion expressed in this testimony is, indeed, inescapable. The only credible testimony was that the water line of the PIONEER was about a foot out of water—six inches higher than usual, when she went aground. A very small portion of the five foot rise in tide

anticipated would have floated the PIONEER and by the time of the second try, time enough had elapsed for this to occur.

There was a good deal of speculative testimony that as the tide rose the danger of damage to the PIONEER would increase. This testimony was based, however, on assumptions inconsistent with the facts. Mr. Berry assumed that the bow of the PIONEER was three to four feet out of water.

His testimony in this connection was as follows [A. 132]:

> "A. The PIONEER was almost horizontal to the beach. I would say it was on a 15, 20 or possibly 25 degree diagonal to the beach, and it was possibly three-quarters of a mile off short and lying on the rocks which was surrounded by kelp, with the bow, I would say, about three or four feet above water. We didn't come more than three or four hundred feet close to the vessel on account of the kelp and the rocks."

He apparently meant by this that there was daylight below the bow, for he testified that a twelve or fifteen-foot tide was necessary to float the PIONEER [A. 142]. Neither Mr. Xitco or anybody else agreed with this assumption.

Captain Varnum likewise rested his testimony on an assumption which was equally in disaccord with the facts, for he assumed that the PIONEER had broken its propeller blades and would have to pull itself off with its anchors. He testified [A. 157]:

> "Q. In other words, in your opinion there would be no assurance that even high tide would float her

> off? A. A lot of things can happen from the time he went on before he would have any means of pulling himself off with his anchors. He had no more propeller, he had broken his blades, and in the meantime, she is pounding and might not be fit to take off when he got his anchors out."

That this assumption was completely erroneous was shown by the fact that the PIONEER made port under her own power. The suppositions based on assumptions so fallacious cannot be ascribed any weight.

To sum up, it would seem that the situation was one where, quite apart from the varied sources of outside assistance to the PIONEER, it appears highly probable that she could have released herself.

B. The Potential Ability of the Pioneer to Free Itself Was Material.

If there could be any doubt that the potential ability of the PIONEER to free herself was most material, that doubt we believe must be clearly resolved by the case of *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.,* 94 Fed. 214, which we have mentioned before. In this case the steamship TORR HEAD was grounded on Frying Pan Shoals off the South Carolina coast. Her value was $300,000. An attempt was made to back her off which did not succeed. The steam tug BRANDOW was then engaged and commenced to pull against the TORR HEAD; this was at about 9:30 a. m. the day of the stranding. At 12:30 p. m. the tug BLANCHE, with a salvage crew, arrived. At 3:30 p. m. a small steam tender called the ISABEL also arrived, all tugs pulling

against the TORR HEAD. This continued until 5 p. m. without result. The captain of the ship then ordered the tugs to stop towing and run the steamship's starboard anchor out. With the aid of the anchor, the vessel was turned about. The tugs left about 7:30 p. m. over the protest of the master and returned later. In the meantime, the ship had jettisoned cargo until about 10 p. m. About 11 p. m. one of the tugs ran out the anchor straight ahead. At about 1 a. m. on the morning of the 25th, all tugs pulled together with the ship working her engines and straining on the chain. In much this manner work continued until about 4:25 a. m., at which time the vessel was afloat. The trial court gave an award of $13,000 which, on appeal, was cut to $6,500 by the Fifth Circuit Court of Appeals, the Court relying heavily on *The Hesper, supra,* and stating at p. 220:

> ". . . In addition to this, we think it apparent from the record that the allowance of salvage was made largely on the theory that the libelants' tugs and their crews really performed the whole services of saving the TORR HEAD from impending peril, while the fact is, as clearly appears from the evidence, and hereinbefore referred to, the real services which put the TORR HEAD afloat were rendered by the master and crew of the TORR HEAD, using her machinery and appliances; and it seems probable,—extremely probable,—the good weather continuing, that without the services of the libelants' tugs the energetic master of the TORR HEAD would have successfully floated his vessel through the use of his own crew and appliances."

In that case it will be observed that the danger was much like that existing in this case, the value of the vessel salvaged was three times as large, and the services rendered were over a very much more substantial period of time. As will appear hereafter, the same mistake appears to have been made in dealing with our case as was made by the District Court in the TORR HEAD case. It is hard to see how, in the face of the reduction by the Circuit Court in the TORR HEAD case, the present award can stand, and, in fact, it is hard to see how appellee could receive anything like as much as was awarded in that case.

In *The Wahkeena* (C. C. A. 9th), 56 F. (2d) 836, at 838, the Court likewise indicates that this factor is regarded as important in this Circuit, for it there stated:

> "(2) Similarly, the appellant cites some testimony tending to show that the WAHKEENA could have kept afloat, drifted clear of the jetty, and saved herself. There is, however, considerable evidence that the stricken schooner's chances of saving herself, in her crippled condition, were extremely slim. It must be remembered that both of the WAHKEENA'S boilers were cut out, and that the vessel was without steam. Furthermore, her radio went out of commission, and she had no signaling device other than her bell and rockets.
>
> "On the whole, we are inclined to agree with the lower court that both the WAHKEENA and her rescuer encountered some danger. We likewise concur

with the view that 'The Court can only speculate as to whether the "WAHKEENA" would have come off the jetty with the turn of the tide, and, if so, whether she would have been picked up by some other boat before again stranding.'

"We do differ, however, with the learned judge below as to the degree of the danger and as to the value of the CUDAHY'S services in towing the stricken schooner back to port."

It will be observed that in that case the argument that the salved vessel would have come free with the tide was found to be merely speculative. We should assume, however, from the treatment given the argument in that case, that if there had been tangible evidence, to a practical certainty, as in the present case, of such ability, and if the WAHKEENA had been capable of making port under her own power, as the PIONEER was, the factor would have been treated as of considerable significance.

The WAHKEENA is further of the utmost importance, in that it does specifically hold that the error of the trial court in appreciating the degree of danger of the WAHKEENA was ground for a reduction in the award.

Likewise, in the *Edith L. Allen* (C. C. A. 2d), 129 Fed. 209, the Second Circuit Court of Appeals had before it a similar problem. In that case the District Court had mistaken the degree of danger to the salved vessel because it has misunderstood the effect of a change in wind on the danger of a stranded vessel. On the basis of that misunderstanding as to danger, it reduced the award.

From these authorities we would take it to be unquestionable that if the trial court failed to consider as a material factor the high probability that the Pioneer could free herself, that in itself would require a substantial reduction in the award.

C. The Ability of the Pioneer to Free Herself Was Not Recognized as a Factor in Determining the Award.

The court's oral opinion makes it quite clear that it did not enter into a consideration of whether or not the PIONEER might free herself, treating this as a mere matter of speculation, and treating as the only significant item the fact that the NORTH QUEEN had actually pulled the PIONEER off. At A. 50 the court stated:

> ". . . Here we had, according to the undisputed evidence, a calm or a relatively calm sea. The operation occurred during a month when weather is somewhat uncertain. I am saying that because I think the court has the (69) right to consider the history of the times, and to use its own knowledge of such matters, so that there could not be any definiteness with reasonable certainty as to what would ensue toward the latter hours of the night in question. The same condition of weather might have continued. On the other hand, there might have been some disturbances either by wind or wave that would have aggravated the situation. There was great peril there, not only because of the position of the "Pioneer", but because of the kelp that, according to the undisputed evidence, was present in large area, which was a serious inter-

ference with maneuvering ships of the size of the two ships in question. So that we have the peril of a ship that was in extremis. She was on the rocks. Whether she was fast or whether she was extricable is a pure matter of conjecture. The fact is she was extricated by the efforts of the libelant."

This failure to consider the ability of the stranded vessel to free herself is the exact factor that led to the reduction of the award in the TORR HEAD.

The findings, as they do consistently through this case, confirm the view given by the oral opinion, for there is nothing in the findings which would indicate that there was any awareness of the probability that the PIONEER could free herself. On the contrary, the description of the position of the PIONEER is merely the following [A. 57]:

> ". . . that said vessel thereupon immediately sent out a distress call for help over her radio; that the said vessel was then and there in peril in extremis, stranded on the rocks and surrounded by kelp; *that her own means could not remove her from the strand;* that immediate aid was required." (Italics added.)

This finding expresses a conclusion which is right in the teeth of the physical facts. It makes explicit what was merely implicit in the oral opinion, that is, that the award is based in part or mistake as to the danger of the PIONEER. Such error is plain ground for modification of the award.

Ulster S. S. Co. v. Cape Fear etc. Co., supra;
The Edith L. Allen, supra.

V.

The Court Erred in Failing to Consider the Lack of Expense to the Salvor.

Assignments of Error applicable:

> "XVIII. That the court erred in that it did not find or consider in determining the amount of the salvage award that the services of the North Queen were performed without cost or expense, loss or damage, or substantial risk to the North Queen, its owners, master or crew."

A. The Labor and Expense of the Salvor Is a Material Factor.

We do not proposed to collect cases in support of this proposition, because we do not believe it necessary. *The Tordenskjold* (C. C. A. 5th), 255 Fed. 672, is one of the many cases in which this factor is treated as significant in reducing an award. We question, in fact, whether there is a single reported salvage case in which this factor is not mentioned, where there is any attempt at an exposition of factors considered.

B. Lack of Expense to the Salvor Was Not Considered; on the Contrary, It Was Assumed That the Salvor Suffered a Loss of Fish.

In the present case, the labor and expense are insubstantial. An hour and a half to two hours was involved. This is mentioned by the Court in its oral opinion [A. 52]. That the insubstantiality of the expense involved was not considered appears from the findings, for this factor is no-

where mentioned in them. The court's oral opinion confirms this inference. The opinion shows that, in originally fixing the award, rather than considering the case as one in which there was no evidence of expense to the salvor, the court assumed that there was a loss of fish to the salvor.

At page A. 54 the court stated:

> ". . . I am not making the award either upon the possibility of there being a catch of the entire 190-ton capacity of the ship, nor upon the percentage of the value of either or both ships. *I am not leaving those elements out of consideration,* but I am not making the award essentially upon either of them." (Italics ours.)

There was no evidence in this case that other vessels caught fish on the night in question, and there was no evidence of a catch on preceding or subsequent nights by the NORTH QUEEN. Courts will not assume a loss of earnings to vessels engaged in the "speculative business of sardine fishing" in the absence of such evidence.

> *John Grevstad v. Oil Screw St. Mary* (N. D. Cal.), 1936 A. M. C. 755;
>
> *Atchison, T. & S. F. Ry. Co. v. California Sea Products Co.* (C. C. A. 9th), 51 F. (2d) 466, at 468.

The latter case involved whale fishing rather than sardine fishing, but the principles applicable are in no way distinguishable.

VI.

The Court Placed Overweening Emphasis on the Skill of Appellee.

Assignments of Error applicable.

> "IX. That the court erred in finding, and in considering in making the award, that the salvage services performed by the North Queen, her crew and master, were of a very high order of merit.
>
> X. That the court erred in that it did not find and did not consider in making the award that the services rendered by the North Queen, her crew and master, did not call for or involve exceptional skill or heroism.
>
> XI. That the court erred in that it did not find or consider in determining the award, that the assistance rendered by the North Queen was rendered without substantial peril to, expense to, or sacrifice by the North Queen, her master or crew.
>
> XVIII. That the court erred in that it did not find or consider in determining the amount of the salvage award that the services of the North Queen were performed without cost or expense, loss or damage, or substantial risk to the North Queen, its owners, master or crew."

A. Skill Appears to Have Been the Principal Factor Upon Which the Award Was Based. The Services Here, Although Skilfully Performed, Involved Nothing Extraordinary or Unusual.

We have heretofore referred to the fact that the skill with which appellee assisted the PIONEER seems to have been virtually the sole factor considered in making the award. The only factors referred to in the findings are danger to the PIONEER and skill of the NORTH QUEEN.

The eighth finding seems to show the confusion between the merit of the salvage, which is the resultant of many factors, and the skill of the salvor, which is only one of the factors involved. It is as follows [A. 59]:

> "That it is true that the salvage services rendered by the 'North Queen' and her crew and master were highly skillful and of a very high order of merit; that their manner of working the vessel off the rocks showed real seamanship in an emergency and exceptional skill based on experience of a high type; that the efforts of the 'North Queen' and crew were the prime and major factor which resulted in the freeing and extricating of the 'Pioneer' from the rocks."

The finding in this respect appears to reflect a parallel confusion in the oral opinion in the District Court, for, in summing up the merit of the services, the court made the following statement [A. 54-55]:

> ". . . It was the maneuvering of the vessel in a way to give leverage so that the greatest amount of beneficial force could be used on the disabled vessel, and at the same time taking proper precautions to not submit the salvor to an unusual risk. It is those two features which I think bring the case up into the dignity of a high degree of skill."

We do not attempt to controvert the proposition that the service was skillfully rendered. But there was certainly nothing extraordinary or unusual about it. Moreover, in view of the fact that there was another vessel standing by to add its force to that of the North Queen, should the North Queen fail, we do not think that it can be said that extraordinary or unusual skill was called for. And, in view of the inability of a 5/8-inch wire to take the strain necessary to pull the Pioneer off, we think that it must be

assumed what actually happened was that the PIONEER *floated* off, with the assistance of the drag exerted by the NORTH QUEEN. There are countless cases in which the courts have spoken of like services as involving no extraordinary skill, and many of those we have quoted already for other purposes. We will, therefore, cite no further authority in this behalf here.

The service was skillfully and promptly rendered. Skill alone, however, in the absence of danger or hardship to the salvor, and in the absence of substantial labor or expenditure, does not justify treating salvage as of a very high order.

The Naiwa (C. C. A. 4th), 1924 A. M. C. 1432;
The Professor Koch, 260 Fed. 969.

In the former case the court stated at page 1434:

> "The claim asserted is undoubtedly for a salvage service, but whether the same may be considered of a high order of merit as that term is generally understood, is questionable. So far as promptness in the discharge of the undertaking and intelligent execution thereof is concerned, no improvement could doubtless well have been made, since the libellant is an expert in its business, and of large and varied experience; but otherwise what was done did not embrace elements which enter particularly into the increase of the merit of the service, that is to say neither existing weather, sea or other conditions prevailed that so frequently make an undertaking of this sort hazardous in the extreme."

In the latter case, the court stated at page 972:

> ". . . The most meritorius feature of the libelant's services, as I view them, is the good judgment and skill in handling and navigating the tugs and the

wreck which was displayed by Capt. Nickerson (the libelant's manager) and his assistants. Their work seems to have been done exactly right from start to finish. But the libelants are not entitled to any such enormous toll out of the barque and her cargo as their libel claims. They are entitled to the market value of their services, plus a fair reward for the risk, which was little, for the promptness, which was excellent, but not exclusive, for the skill displayed, and for the success which resulted. The predominant consideration, as it seems to me, in awards for salvage service, where the property has not been abandoned, is that they should be sufficient to obtain again, if circumstances should repeat, the same, or adequate, service. The Samuel B. Hubbard (D. C.) 229 Fed. 843.

"Applying these principles, I think that $10,000, which is more than four times the commercial value of the libelant's work, and many times that of its work in getting the barque from the rock where she stranded into Scituate harbor, is adequate, and is in harmony with awards in similar cases."

It is worthy of note that in the latter case, which involved freeing a stranded barque worth $117,000, with a cargo of $713,000, the award was $10,000. The tugs involved were of a value of $150,000 and spent a time of around 200 hours on the job. In that case, as in this case, other assistance (in the form of a revenue cutter) was available.

We need not draw the obvious comparison between that case and the present case.

It is submitted that the foregoing authorities establish that the court erred in treating the case as one involving service of a high order of merit, solely on the strength of skill ~~plus danger~~ without danger.

VII.

The District Court Erred in That It Granted an Award Which Departs From the Path of Authority and Is Palpably Excessive.

A. An Award Which Is Palpably Excessive, and Which Departs From the Path of Authority, Will Be Reduced.

We have already pointed out, in opening this brief, that an award which "does not follow in the path of authority" will be reduced, "even though no principle has been violated or mistake made."

The Bay of Naples (C. C. A. 2d), 48 Fed. 737;

Canadian Government Merchant Marine Ltd. v. United States (C. C. A. 2d), 7 F. (2d) 69, 1925 A. M. C. 765.

Similarly, it has been sometimes said that an award will be modified if "clearly . . . inappropriate."

Simpson v. Dollar (C. C. A. 9th), 109 Fed. 814.

Similarly, in *Huasteca Petroleum Co. v. 27,907 Bags of* Coffee (C. C. A. 2d), 60 F. (2d) 907, 909, an award was reduced, the court (per Augustus Hand, J.), stating that the award allowed was "far more than has been customary in similar cases."

B. This Award Far Exceeds Those Which Have Been Customary for Like Services.

We have already cited and discussed at some length in connection with various arguments number of cases involving services rendered to stranded vessels in calm weather, in which cases the Circuit Courts intervened to alter the award.

In *The Hesper* (18 Fed. 692, mod. 18 Fed. 696, aff'd 122 U. S. 256, 7 S. Ct. 1177), the value of the vessel assisted was $106,000, and the award for assistance was reduced from $8,000 to $4,200. Similarly, in *The Lucia* (D. Ct., S. D. Fla.), 222 Fed. 1015, the District Court, for similar services to a vessel worth $300,000, awarded $4,000. In *Ulster S. S. Co. v. Cape Fear Towing & Trans. Co.* (C. C. A. 5th), 94 Fed. 214, an award of $13,000, nearly the same amount as that awarded in this case, was cut to $6,500. The vessel involved was worth about $300,000. In *De Aldamiz v. Th. Skogland & Sons* (C. C. A. 5th), 17 F. (2d) 873, the award for freeing a stranded vessel, worth $60,000, was $5,000, an increase of the District Court award. In *Simpson v. Dollar* (C. C. A. 9th), 109 Fed. 814, an award of $1,000, though recognized to be on the low side, was approved by this Circuit Court for similar services in assisting a vessel worth about $40,000.

The cases heretofore referred to, in which awards for fair weather assistance to stranded vessels were allowed in the neighborhood of the award in this case, are cases where the values are greatly in excess of those presented here.

The Tordenskjold (C. C. A. 5th), 255 Fed. 672 (reduction of award from $40,000 to $10,000; value of stranded vessel about $1,000,000);

Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co. (C. C. A. 4th), 280 Fed. 334 (valued at $370,000; 39 hours' labor; a reduction of award from $35,000 to $20,000).

It will be observed that the foregoing cases, with the exception of *The Lucia* and *Simpson v. Dollar,* are not merely cases in which a different award was granted, but

The

Assignments of Error Applicable.

XX. That the court erred in finding that the salvage services of the NORTH QUEEN, her master and crew, to the PIONEER, were and are of the value of $12,000.00.

XXI. That the court erred in adjudging, ordering and decreeing [88] that libelant recover from the respondent vessel PIONEER the sum of $12,000.00.

In *The Hesper* (18 Fed. 692, mod. 18 Fed. 696, aff'd 122 U. S. 256, 7 S. Ct. 1177), the value of the vessel assisted was $106,000, and the award for assistance was reduced from $8,000 to $4,200. Similarly, in *The Lucia* (D. Ct., S. D. Fla.), 222 Fed. 1015, the District Court, for similar services to a vessel worth $300,000, awarded $4,000. In *Ulster S. S. Co. v. Cape Fear Towing & Trans. Co.* (C. C. A. 5th), 94 Fed. 214, an award of $13,000, nearly the same amount as that awarded in this case, was cut to $6,500. The vessel involved was worth about $300,000. In *De Aldamiz v. Th. Skogland & Sons* (C. C. A. 5th), 17 F. (2d) 873, the award for freeing a stranded vessel, worth $60,000, was $5,000, an increase of the District Court award. In *Simpson v. Dollar* (C. C. A. 9th), 109 Fed. 814, an award of $1,000, though recognized to be on the low side, was approved by this Circuit Court for similar services in assisting a vessel worth about $40,000.

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It will be observed that the foregoing cases, with the exception of *The Lucia* and *Simpson v. Dollar,* are not merely cases in which a different award was granted, but

are cases in which the appellate court intervened to set a proper figure. They are closely analagous to the present case, except that the services rendered generally required a great deal more time than those involved in the present case; and in most of them the salved vessel was not in nearly so good a position as the PIONEER, in terms of its ability to free herself and in terms of the availability of other assistance. It would seem that in these cases higher awards were justified than in the present case, but if these cases, without any such allowance, be applied unaqualifiedly to the present situation, the most that would seem to be justified would be an allowance to appellee in the neighborhood of $4,500.

In order, however, properly to appraise the present situation, we think that other cases, where the service rendered was as short as that in this case, also should be taken into consideration so that the awards referred to above may be properly discounted.

The first case which should probably be considered in this connection is that of *Richfield Oil Co. v. Curry et al. (The Kekoskee)* (C. C. A. 9th), 55 F. (2d) 875, 1932 A. M. C. 287.

In this case the tanker of that name, valued at around $500,000, was discharging fuel oil at a Seattle dock. The oil, gasoline and debris under the dock caught fire. The KEKOSKEE was discharging fuel oil at the time the fire was discovered, and the whole forward part of the ship caught fire shortly after the commencement of the blaze. The tug GEORGIA, valued at $60,000, maneuvered under the stern of the KEKOSKEE, made a line fast to it after practically all the crew of the KEKOSKEE had left, and pulled the ship away from the dock. Their services were prompt, skillful and efficient, and there was an exposure

to great danger, either real or apparent, because of the likelihood of explosion on board the KEKOSKEE. It was believed by the crew of the GEORGIA that the KEKOSKEE was discharging gasoline rather than oil at the time the fire occurred, which certainly does not reduce the credit for their services. An award of $11,000 was granted.

In that case, it will be observed that the period of service was close to that in the present case; the value salvaged was close to five times as great; there was great danger to property as opposed to little danger to property in the present case, and great danger to life as opposed to no danger to life in the present case.

Even were the dangers equivalent, in view of the great difference in values, a much lower award in the present case would appear to be required. In view of the fact that there was also a great difference in danger, it would seem that appellee would be liberally rewarded if he received twenty-five per cent of the amount granted in that case. From the other cases involving services over similar short periods of time, it would seem questionable as to whether even that much should be given.

A somewhat similar case involving a stranding is *The St. Charles* (E. D. Va.), 254 Fed. 509, in which the vessel ST. CHARLES, valued at $500,000, pulled the MONT CENIS, valued at $2,000,000, off the strand in a space of about three hours. No special circumstances of danger were involved so that the comparison is closer to the present case than to the KEKOSKEE. $15,000 was awarded and this, it will be noted, where the value salvaged is more than fifteen times as great as that in the present case.

The rapid decline in the amount of such awards for so short a period of service, in the absence of evidence of danger, is illustrated by the case of *The Agwisun* (C. C. A. 2d), 1931 A. M. C. 957, 49 F. (2d) 263. In that case there were circumstances of danger, apparently, however, not as great as in THE KEKOSKEE, previously cited. In this case a $70,000 tug came to the assistance of a tanker on fire, playing water on flames wherever seen and on heated plates. The tanker was valued at $341,395. An award of $1,000 by the District Court was increased to $3,000 by the Circuit Court of Appeals.

In *The Egbert H* (C. C. A. 5th), 131 F. (2d) 111, a vessel of that name, valued at $25,000, was caught with her engines dead beneath a bridge in the Savannah River. She was in imminent danger of sinking as the tide was rising, and she had a freeboard of only ten inches. If she had sunk the damages would probably have run from $12,000 to $15,000. The tug CYNTHIA No. 2, valued at $125,000, came to her rescue and towed her to safety, without risk to herself. An award of $3,000 in the District Court was reduced to $1,000 by the Circuit Court of Appeals.

It is believed that these authorities suffice to show that where services are rendered over so very short a period of time, the award is less than it would otherwise be. The foregoing and following cases also show, it is submitted, that the award in the present case far exceeds those which have been customary.

In

Rustad v. Wuori (The Melody) (C. C. A. 9th), 1946 A. M. C. 1637, 157 F. (2d) 448,

$4,300 was awarded out of a salved value of $19,500 for the towing of a derelict. There were circumstances of hardship and difficulty in an extreme degree, and something approaching heroism, as well as proof of loss of fish in the amount of $3,000 to $5,000 to the salvor.

In

The Bretanier (C. C. A. 4th), 267 Fed. 178,

assistance was rendered to a stranded vessel, valued at $500,000, over a period of at least five days by a salvor, valued at $175,000, consisting of obtaining and laying wrecking anchors by which the vessel in distress was freed. $12,000 was awarded.

In

United States v. Central Wharf Towboat Co. (C. C. A. 1st), 3 F. (2d) 250,

a steamer valued at $70,000 was stranded and pounding in heavy weather in a storm, the violence of which was increasing. Two tugs, together with the revenue cutter OSSIPEE, freed her and towed her to port. The tow was an extraordinarily difficult and dangerous one. The period of the assistance does not clearly appear. $9,000 was awarded to tugs whose value totaled about $75,000.

In

The City of Portland (C. C. A. 5th), 298 Fed. 27,

three tugs were towing a motor schooner valued at $300,000. The propeller shaft dropped out and they beached her and pumped her out. This was held to be a salvage service and, while the district Court awarded $15,000, this award was reduced to $6,000 by the Circuit Court of Appeals. Seventy hours' service was provided in all by the three tugs.

In

Holmes v. City of New York (C. C. A. 2d), 30 F. (2d) 366,

a tug removed a dumper barge valued at $42,000 from a pier at which there was a fire. The fire was not particularly serious and the service was rendered in a fairly brief period of time. $2,000 was awarded by the District Court, which was reduced to $1,000 by the Circuit Court of Appeals.

In

The Professor Koch (D. Mass.), 260 Fed. 969,

$10,000 was awarded for pulling a stranded barque, valued at over $800,000, off a rock in fair weather. The value of the tugs employed was about $150,000, and the various tugs employed were occupied for a little over 200 hours.

In

The High Cliff (C. C. A. 2d), 271 Fed. 202,

$5,000 had been awarded by the District Court for services rendered by a tug in taking a barge, which was adrift with a cargo worth $200,000, into still water. The award was reduced by the Circuit Court of Appeals to $2,500.

In

The Santa Barbara (C. C. A. 4th), 299 Fed. 152,

a vessel valued at from $300,000 to $350,000 was taken from alongside a pier on which there was a very serious nitrate fire. About an hour and a half was occupied, and there was substantial danger. $8,500 was awarded.

In

The Peru (E. D. Pa.), 99 Fed. 783,

a tug valued at $3,500 pulled a sailing ship, valued at $60,000, away from a pier fire. $2,500 was awarded, there being no special danger to the tug.

In

The Niagara (S. D. N. Y.), 89 Fed. 1000,

a ship of that name stranded in the harbor of Santiago de Cuba. Her value was $125,000. The MAMALUKE, a steamer of 2,600 gross tons, about the same size as the NIAGARA pulled the NIAGARA off the strand. The MAMALUKE was the only vessel available capable of doing the job, and had great difficulty, because of her size, in maneuvering in the narrow channel required. $7,100.84 was allowed. The services extended over three days, and there

was a claim of $3,200 for wear and tear to machinery, and for fuel for which nothing over the award was allowed.

In

The Labrador (E. D. N. Y.), 39 Fed. 503,

the subject-vessel, valued at $200,000, having a cargo on board worth $750,000, caught fire. The McCaldin, together with the Rescue, beached the Labrador and put out the fire. $4,500 was awarded to the McCaldin. It was shown that the actual danger of total loss of the cargo was not great.

It would be possible to continue in this same manner more or less interminably. It seems to us, however, that the foregoing cases are quite sufficient to establish that the award in the present case exceeds the customary standard by a wide measure, and is palpably excessive. Where comparable awards had been made by district courts for services comparable, or, for that matter, substantially exceeding those in this case, to vessels of like valuation, they have been quite consistently reduced by the circuit courts. This case has none of the circumstances held to authorize a high award. There is neither substantial danger to the salvor or to their ship, nor hardship, and certainly there is nothing that could be called heroism. Other assistance was available; the Pioneer herself was not in immediate danger and was not helpless. We do not see how it could be seriously contended that the North Queen was entitled to more than a very moderate award.

Conclusion.

Appellee has received an award of $12,000 for an hour and a half to two hours' service rendered in calm weather, without special circumstances of hardship or danger. It appears probable that the PIONEER could have freed herself on the rise of tide, and certainly there was assistance other than the NORTH QUEEN available. There is no evidence of expense to the NORTH QUEEN. It is respectfully submitted:

First: That under these circumstances a $12,000 award on somewhat less than a $113,000 valuation is grossly excessive.

Second: That this award was the consequence of legal error in that the Court failed to consider the availability of other assistance, was mistaken in assuming that the PIONEER could not free herself, and failed to consider the lack of danger and the absence of expense to the NORTH QUEEN.

It is respectfully submitted that the award should be very substantially reduced. In view of the authorities cited above, it should not exceed at most about one-fourth of the amount actually granted, and an even greater reduction would be amply justified.

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